

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ESI ACT NO.1/2006

Employees State Insurance)
Corporation, through its Deputy)
Regional Director, Panchadeep)
Bhavan, EDC Plot No.23, Patto,)
Panaji, Goa.) ... Appellants

Versus

1. M/s. R.K. Furnaces,)
S/A-5, Industrial Estate,))
Zuarinagar, Sancoale, Goa,))
represented by Shri Ramakant)
P. Kamat, Sole Proprietor.)
2. Mamlatdar,)
Marmagoa Taluka, Marmagoa.) ... Respondents

Ms. A.A. Agni with Mr. M.S. Prabhu Desai for the appellants.

Mr. V. Palekar for respondent 1.

Mr. S. Vahidulla, AGA, for respondent 2.

CORAM : SMT. RANJANA P. DESAI, J.

DATED : 29TH JUNE 2006.

JUDGMENT :

1. The appellants – Employees State Insurance

Corporation has challenged in this appeal, judgment and order dated 26/8/2005 passed by the Presiding Officer, Employees Insurance Court, North Goa at Panaji in ESIC No.4/2000. This appeal is preferred under section 82 of the Employees State Insurance Act, 1948 (for short, “the said Act”). Under section 82 of the said Act, an appeal lies to the High Court from an order of an Employees’ Insurance Court if it involves a substantial question of law. It would be, therefore, necessary to see whether this appeal involves any substantial question of law. Since, it is an appeal, before dealing with the rival contentions, I have not only perused the impugned judgment but also the records of the case and the deposition of the witnesses.

2. Respondent 1 filed an application under section 75 of the said Act, inter alia, for a declaration that the respondents are not covered under the provisions of the said Act. The appellants’ case, in short, is that their Inspector visited the appellant's establishment in August, 1981 and found that the 1st respondent had engaged 13

employees. This fact was brought to the notice of the 1st respondent. The 1st respondent, however, failed to furnish the particulars even though the coverage intimation was sent to them on 26/10/1981. According to the appellants, the 1st respondent failed to produce the required documents on the date the Inspector had visited the premises. It is the case of the appellants that the 1st respondent has failed to pay contribution as well as the damages from time to time and, hence, recovery action has been resorted to.

3. Evidence was led by the parties. On behalf of the 1st respondent, one Mr. Ramakant Kamat was examined and on behalf of the appellants one Mr. V. Balakrishnan, Deputy Director, ESI Corporation and Mr. J.S. Moorthy, Deputy Director of ESI Corporation were examined. After perusing the evidence, the learned judge came to the conclusion that the impugned order passed by the appellants under section 45-A of the said Act is liable to be set aside. The learned judge also held that the 1st

respondent was not covered under the provisions of the said Act. It is this order which is challenged before me.

4. I have heard, at considerable length, Ms. Agni, the learned counsel appearing for the appellants. She contended that the learned judge erred in holding that the four workers, who were found working in the premises of the 1st respondent were doing the work of casual nature and, hence, the said employees cannot be considered for deciding the coverage. The learned counsel contended that several important and vital documents were not considered by the learned judge and, therefore, the impugned order can be characterized as perverse. She submitted that important question of law as to whether the workers engaged for the work of changing the electrical wiring are included within the definition of employee as found in Section 2(9) of the said Act and whether the test to be employed is whether the employee was doing any work in connection with the establishment is involved in this appeal. The learned counsel contended that another

important question would be whether the employees, who are paid wages for the portion of a week i.e. employed for less than a week would also be covered by the scope and ambit of section 2(9).

5. The learned counsel placed reliance on the judgment of the Supreme Court in **Royal Talkies, Hyderabad and others v. Employees' State Insurance Corporation through its Regional Director, Hill Fort Road, Hyderabad, AIR 1978 SC 1478** and contended that under the provisions of the said Act all that is required is that the work undertaken by the employees should not be irrelevant to the purpose of the establishment and it is sufficient if it is incidental to it. She submitted that to achieve the object of the said Act, a narrower construction cannot be put on the definition clause. She pointed out that in **Royal Talkies's case (supra)** also, the employees were not directly employed by the principal employer, who were theatre owners. The Supreme Court held that the work done by the employees therein in the canteen and

cycle stand which were within the premises of the cinema theatre was incidental to the purpose of theatre which was run by the principal employer therein and, therefore, the employees would be covered by the definition clause. Ms. Agni submitted that this judgment would be applicable to the present case.

6. The learned counsel then relied on the judgment of the Supreme Court in **Regional Director, Employees' State Insurance Corporation, Madras v. South India Flour Mills (P) Ltd., AIR 1986 SC 1686**. She contended that in this case, the Supreme Court has stated in no uncertain terms that even casual employees come within the purview of the said Act. The learned counsel then relied on the judgment of the Supreme Court in **Employees State Insurance Corpn. V. M/s. Harrisons Malayalam Pvt. Ltd. 1994 (1) LLJ 12**. The learned counsel pointed out that in this case, the Supreme Court has held that under the scheme of the said Act the contribution paid entitles the workman insured to the benefit under the said

Act. However, he does not get any part of the contribution back if during the benefit period, he does not qualify for any of the benefits. The contribution made by him and by his employer is credited to the insurance fund created under the said Act and it becomes available for others or for himself during other benefit periods, if he continues in employment. The Supreme Court has further observed that the obligation to make contribution does not depend upon whether the particular employee/employees cease to be employee/employees after the contribution period and the benefit period expire. The obligation ceases only when the Act ceases to apply to the factory. The learned counsel contended that therefore whether the four employees were employed for a short period or whether they are continued to be in the employment is not relevant. The employer cannot wriggle out of the obligation to make the contribution. She submitted that it is, therefore, necessary for this court to admit this appeal on the substantial questions of law raised in this appeal.

7. On the other hand, Mr. Palekar, the learned counsel for the 1st respondent placed heavy reliance on the judgment of the Supreme Court in **C.E.S.C. Limited & Ors. V. Subhash Chandra Bose & Ors. 1992(1) CLR 932** and contended that no interference is necessary with the impugned order as what is sought to be challenged is purely a finding of fact. He contended that there is no substantial question of law involved in this appeal and hence, the appeal does not merit admission.

8. In **C.E.S.C. Limited's case (supra)**, the Supreme Court was considering the question whether the right of the principal employer to reject or accept work on completion, on scrutinizing compliance with job requirements, as accomplished by a contractor, the immediate employer, through his employees, is in itself an effective and meaningful "supervision" as envisaged under section 2(9) of the said Act. The facts of the case before the Supreme Court were somewhat similar to the facts before this court. In that case, the C.E.S.C. Limited had engaged

certain workers through a contractor, inter alia, to carry out work of excavation, conversion of overhead electric lines and laying of underground cables under public roads. The question was whether the said workers would fall within the scope of section 2(9)(ii) of the said Act. After considering the relevant cases on the point and after referring to its judgment in **Royal Talkies' case (supra)**, the Supreme Court observed as under :

“In the ordinary dictionary sense ‘to supervise’ means to direct or oversee the performance or operation of an activity and to oversee it, watch over and direct. It is work under eye and gaze of someone who can immediately direct a corrective and tender advice. In the textual sense ‘supervision’ of the principal employer or his agent is on ‘work’ at the places envisaged and the word ‘work’ can neither be construed so broadly to be the final act of acceptance or rejection of work, not so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help

to carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinize the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act.”

9. In this case also the four workers found in the premises of the establishment were workers of R.K. Electricals. A finding of fact is recorded that they were not under the supervision of the first respondent. This finding of fact is not perverse. It cannot be said, therefore, that the four workers fall within the ambit of Section 2(9) of the said Act.

10. In **Royal Talkies' case (supra)**, the employers were the owners of theatre. The canteen and cycle stand situated in the premises of the theatre were leased out to the contractors. The contractors had employed their own servants to run the canteen and cycle stand. The owners of the theatre were treated as principal employers and notices of demand were issued to them calling upon them to pay contribution under the said Act. The employers contended that they were not covered by the provisions of the said Act. The insurance court held that the owners of the theatre were the principal employers with reference to the persons employed by the contractors in the canteen and the cycle stand attached to the theatre and, rejected the application filed by the owners under section 75 of the said Act. When the matter reached the Supreme Court, the Supreme Court held that the expression "in connection with the work of an establishment" found in section 2(9) of the said Act postulate the work, which is ancillary, incidental or has relevance or link with the object of the establishment. The Supreme Court observed that surely an amenity or facility

provided for the customers, who frequent the establishment have connection with the establishment. The Supreme Court observed that no one can seriously say that the canteen and cycle stand are not incidental to the purpose of the theatre. Thus the Supreme Court concluded that the employees of the canteen and cycle stand employed by the contractors were covered by section 2(9) of the said Act.

11. The ratio of this case is not attracted to the present case. There is no evidence on record to hold that the work done by the four workers can be equated with the work done by the employees of the canteen and cycle stand situated in the premises of a theatre. The canteen and cycle stand provided an essential amenity to the customers. Such are not the facts here. In this case, the workers were merely changing the electrical wiring of the 1st respondent's business. They were doing the work only for two hours a day only for a short period. The judgment of the Supreme Court in **Royal Talkies' case (supra)** is, therefore, not applicable to the present case.

12. So far as the judgment of the Supreme Court in **South India Flour Mills' case (supra)** is concerned, it is pertinent to note that in that case the company had commenced the construction of another building in the compound of the existing factory and the court was concerned with a number of workmen engaged in that construction activity. While considering whether they are employees within the meaning of section 2(9) of the said Act, the Supreme Court observed as under :

“The work construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. It is not correct to say that such work must always have some direct connection with the manufacturing process that is carried on in the factory. The expression “work of the factory” should also be understood in the sense of any work necessary for the expansion of the factory or establishing or

increasing the work of the factory or establishment. Such work is incidental or preliminary to or connected with the work of the factory or establishment.”

13. It is pertinent to note, in that case the workers were directly employed by the principal employer and the Supreme Court Specifically held that it was concerned with the first category of Section 2(9) inasmuch as in all the cases before it the workers concerned were directly employed by the principal employer and in such cases the work done by the employees should be incidental or preliminary or connected with the work of the establishment. The above observations of the Supreme Court must be read in the context of these facts. There can be no doubt that in such a situation casual workers would come within the purview of the said Act.

14. However, in the facts of this case, it is clearly admitted by the witnesses of the appellants that the workers were engaged by R.K. Electricals and respondent 1

did not supervise their work. The witness of the 1st respondent has stated that no wages were paid to the four employees of the contractor by respondent 1. The learned judge has observed that there was no cross-examination on this aspect at all. There is absolutely no indication either in the evidence or in the record that the 1st respondent exercised any control or supervision over the work carried out by these four employees. These workers were concerned with changing of the electrical wiring and they worked for about two hours in a day for a short period. There is no evidence to establish that work done by these workers was ancillary, incidental or having any relevance to the object of the 1st respondent's work. Therefore, it cannot be said that they would be covered by section 2(9) of the said Act.

15. In this connection I may usefully refer to **M/s. Harrisons Malayalam Pvt. Ltd.'s case (supra)**, which was relied upon by the learned counsel for the appellants. In that judgment, while accepting that even casual workmen

are covered by Section 2 (9), the Supreme Court observed that workmen of casual contractors like plumbers, electricity repairers, air conditioner repairers, computer repairers, T.V. repairers, etc. who are engaged for temporary repair work, would not be covered by the provisions of the said Act. This observation would be attracted to the instant case.

16. In this case, in my opinion, we are concerned only with purely a question of fact. On facts, the court has found that there is no supervision or control over the four employees, who were doing the work of changing electrical wiring on the premises of the 1st respondent and, as such, the 1st respondent was not covered under the provisions of the said Act. This position is well settled in law and, therefore, it cannot be said that any substantial question of law is involved in this appeal. Hence, the appeal is rejected.

(SMT. RANJANA DESAI, J.)

ssm